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13 UNITED STATES DISTRICT COURT

14 DISTRICT OF ARIZONA

15 In Re Bard IVC Filters Products  
16 Liability Litigation

17 No. MD-15-02641-PHX-DGC

18 SHERR-UNA BOOKER, an  
19 individual,

20 Plaintiff,

21 v.

22 C.R. BARD, INC., a New Jersey  
23 corporation and BARD  
24 PERIPHERAL VASCULAR, an  
Arizona corporation,

Defendants.

PLAINTIFF'S RESPONSE IN  
OPPOSITION TO DEFENDANTS'  
MOTION *IN LIMINE* NO. 4 TO  
EXCLUDE TESTIMONY AND  
EVIDENCE REGARDING  
PHOTOGRAPH OF BARD  
EMPLOYEE MICHAEL RANDALL

(The Honorable David G. Campbell)

(Oral Argument Requested)

25 Plaintiff hereby responds in opposition to Defendants' Motion and Memorandum  
26 in Support of Motion *in Limine* No. 4 to Exclude Testimony and Evidence Regarding  
27 Photograph of Bard Employee Michael Randall. For reasons set forth below, Plaintiff  
28 respectfully requests that the Court deny Defendants' Motion *in Limine* No. 4 in full.

25 In context, Mr. Randall's middle finger picture reflects Bard's corporate culture of  
26 disregard for the seriousness of the problems with its IVC filters. The picture was not  
27 plucked from Mr. Randall's personal photo album or Facebook page. It is the second

1 slide in a Bard internal PowerPoint presentation that is a key exhibit. *See Exhibit “A”.*  
 2 Bard’s decision not to attach the picture and PowerPoint to its motion is telling.

3       The PowerPoint is titled “Objective of Meeting” and describes a meeting whose  
 4 purpose would be to “analyze EVEREST and MAUDE data and provide justifications for  
 5 proposed changes to G2 filter.” *Id.* at 1. The PowerPoint goes on to describe the  
 6 complications that Bard’s G2 filter was experiencing based on MAUDE reporting and  
 7 EVEREST (a clinical study that produced data related to retrievability of the G2 filter),  
 8 the goals of the proposed new and improved platform, the necessary design changes to  
 9 achieve those goals, and the risks of the changes requiring Bard to conduct a long-term  
 10 clinical trial to evaluate safety and efficacy of long-term use. Problems with the G2 and  
 11 their causes were discussed. The G2 “often does not have the ability to prevent  
 12 movement” and “Filter Design” was the top “potential cause of the complications . . . ”  
 13 *Id.* at 15. Specifically, the G2 lacked sufficient caudal anchoring and “IVC wall  
 14 apposition,” among other conclusions, which meant the filter could move caudally (away  
 15 from the heart towards the feet). *Id.* And “caudal migration leads to tilts, perforations and  
 16 fractures.” *Id.* at 16. Proposals to improve the G2 Platinum<sup>1</sup> included electropolishing to  
 17 reduce fractures and unspecified “design changes” to reduce “tilt/penetration/migration.”  
 18 *Id.* at 17.

19       Bard’s response to the “complications” associated with the G2 was to attempt a  
 20 redesign of the G2 “without [a] clinical trial.” *Id.* at 3. This would take a lot of time, and  
 21 Bard was concerned about “timeline challenges based on changes.” *Id.* Bard’s goal was  
 22 to make “design changes” to the G2 that might address its problems while avoiding too  
 23 much FDA scrutiny.

24       Although expressed in neutral corporate-speak, Bard’s admissions in the  
 25 PowerPoint are shocking. IVC filters are sharp metallic objects marketed to doctors and  
 26 patients as safe to be implanted *permanently* in the largest vein in the body, inches from

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27       <sup>1</sup> Just as the “G1A” and “Recovery G2” are known as the G2 filter, the G2 Platinum  
 28 became known as the Eclipse filter.

1 the heart and surrounded by other vital organs. The benign term “complications”  
2 minimizes that G2 malfunctions/failures were damaging and scarring the IVC, moving  
3 throughout the recipient’s body cavity, and fracturing sharp pieces of metal to scatter  
4 throughout the most sensitive area of the body. The consequences of Bard’s design  
5 defects weren’t just numbers in a spreadsheet, but pain, permanent internal scarring and  
6 organ damage, additional medical procedures including open heart surgery, and death. Yet  
7 the internal conduct surrounding the treatment of such failures and resulting harm, the  
8 same sorts of failures that Ms. Booker endured, is not only relevant it reflects the exact  
9 purpose of conducting discovery; to discover how the manufacturer was conducting itself  
10 when no one was looking. This is particularly relevant to Plaintiff’s punitive damages  
11 claim.

12 In the context of a project attempting to quietly fix a flawed Bard medical device  
13 injuring and killing patients while avoiding excessive FDA scrutiny and cost, Bard’s  
14 employees chose to introduce Mr. Randall in the PowerPoint as the project leader with a  
15 picture of him ‘giving the finger’ to the camera. Bard’s description in its motion of what  
16 this gesture means is accurate, but what we don’t know is to whom this gesture was  
17 directed. Was the message to the team intended to be that Mr. Randall and Bard were  
18 giving the finger to IVC filter competitors? The FDA? Patients injured by the G2? Bard  
19 and Mr. Randall characterize the picture as a “joke,” but that Bard would make a joke in a  
20 PowerPoint meant to be displayed to many as a representation of addressing such a  
21 serious issue is demonstrative of a corporate culture within Bard that trivialized design  
22 issues, FDA scrutiny, and patient safety.

23 This demonstration of Bard’s cavalier attitude towards the flaws in its product and  
24 the harm it had caused is relevant to a host of issues in this case: the adequacy of Bard’s  
25 design, testing, and failure analysis processes; Bard’s compliance with FDA regulations;  
26 its failure to warn doctors, patients, and the public of the known risks of its filters both  
27 before and after putting them on the market; and punitive damages. As such, the middle  
28 finger picture is relevant and admissible under Fed. R. Evid. 401 and 402.

1        It is also admissible under Rule 403. Although the middle finger picture is indeed  
 2 inflammatory as Bard concedes and thus prejudicial to Bard, there is nothing *unfairly*  
 3 prejudicial about it. It was Bard that put such a vulgar photo into the middle of a critical  
 4 internal document, one that could have been edited before it was shown. There is also no  
 5 unfair prejudice when Bard will have the opportunity at trial to offer Mr. Randall's  
 6 explanation that the middle finger picture was a harmless joke. *See United States v.*  
 7 *Smith*, 502 F.3d 680, 687 (7th Cir. 2007) (holding that district court's admission of picture  
 8 of defendant making obscene gesture was "well within its discretion" where defendant  
 9 "had an opportunity to put the photograph into context for the jury, ameliorating any  
 10 prejudicial effect").<sup>2</sup> Even if there was any unfair prejudice to Bard from admitting the  
 11 PowerPoint in full including the photo, such unfair prejudice does not "substantially  
 12 outweigh" the picture's probative value under Rule 403.<sup>3</sup>

13        Bard's corporate culture of ignoring patient safety to focus on maximizing  
 14 revenues is a direct cause of Bard's failure to adequately design and test its products and  
 15 its failure to properly warn patients and doctors about the risks of its products. The middle  
 16 finger picture within a crucial Bard internal document addressing the defects in its G2  
 17 filter is important evidence of that twisted corporate culture. As such its probative value  
 18 far outweighs any risk of unfair prejudice, Exhibit A including the picture in slide 2 is  
 19 admissible under Fed. R. Evid. 401-403, and Plaintiff respectfully requests that  
 20 Defendants' Motion *in Limine* No. 4 be denied in full.

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 22       <sup>2</sup> Bard cites to *Mems v. City of St. Paul Dep't of Fire & Safety Svcs.*, 2001 WL 1640034  
 23 (D. Minn. Nov. 12, 2001), but that case involved a Plaintiff argument that a picture of two  
 24 of the defendants' employees giving the finger to the camera communicated a racial  
 25 epithet. *Id.* at \*4. The district court properly excluded the picture because the plaintiff's  
 subjective perception of the picture was substantially outweighed by the "inflammatory  
 racial invective" he felt the picture represented, not the picture itself. *Id.*

26       <sup>3</sup> Bard also argues Rule 404, but Mr. Randall is not on trial and Plaintiff does not intend to  
 27 use the picture to attack his character. It is the placement of the picture of the "project  
 28 leader" giving the finger in a PowerPoint on such a serious topic that is relevant and  
 important, not that Mr. Randall posed for the picture.

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2 RESPECTFULLY SUBMITTED this 1<sup>st</sup> day of February, 2018.  
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4 GALLAGHER & KENNEDY, P.A.  
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15 **CERTIFICATE OF SERVICE**

16 I hereby certify that on this 1<sup>st</sup> day of February, 2018, I electronically transmitted  
17 the attached document to the Clerk's Office using the CM/ECF System for filing and  
18 transmittal of a Notice of Electronic Filing.

19 /s/ Gay Mennuti  
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